In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1390

PETER DORNAU, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner claims that the court of appeals erred in reinstating an indictment alleging that he violated 18 U.S.C. 1341 and 1343, because the government failed to prove that the testimony it offered before the grand jury was untainted by its knowledge of petitioner's prior testimony given under a grant of immunity pursuant to the Federal Bankruptcy Act, 11 U.S.C. 25(a)(10).

Prior to trial, the United States District Court for the Southern District of New York dismissed fifteen counts of an indictment charging petitioner, Fred Dornau[1] and Ra-Dor Industries, Inc., with using the United States

[1]Fred Dornau entered a plea of guilty to half the counts that remained in the original indictment. The government agreed not to prosecute him on the counts that were dismissed and consequently did not appeal the district court's decision insofar as it related to him.

mails and using wire communications in interstate commerce in furtherance of a scheme to defraud investors in Ra-Dor, in violation of 18 U.S.C. 1341 and 1343. The government appealed this order to the court of appeals, which reversed the decision of the district court and ordered that the counts in question be reinstated (Pet. App. B; 491 F. 2d 473).

Petitioner was vice-president of Ra-Dor Industries, a defense contractor in bankruptcy. In May 1969, he testified in the federal district court in Florida at the first meeting of Ra-Dor's creditors. He was indicted five months later in the Southern District of New York on 15 counts of mail and wire fraud involving a scheme to defraud Ra-Dor's investors. Petitioner moved for permission to inspect the grand jury minutes and was accorded leave to do so. 356 F. Supp. 1091, 1097-1098. Petitioner then moved for a hearing to determine whether his prior testimony at the meeting of creditors had been used improperly by the government either before the grand jury or in preparing for trial.

The district court's examination of the evidence presented to the grand jury revealed that the Assistant United States Attorney then in charge of the Dornau prosecution had sought and obtained a transcript of the bankruptcy testimony less than a month before commencing presentation of his case to the grand jury. While petitioner was unable to specify any particular instance of taint, the district court, apparently assuming that petitioner had been compelled to testify (Pet. App. A, A-11), held that "the prosecutor may have made derivative use of the testimony in a variety of ways and that the Government had not met its burden of proving freedom from taint." Pet. App. B, A-21; 491 F. 2d at 477. The district court granted petitioner's motion to dismiss the indictment (Pet. App. A; 359 F. Supp. 684).

1. Petitioner contends that, since he testified before a referee in bankruptcy under an automatic grant of immunity pursuant to 11 U.S.C. 25(a)(10),[2] information derived from his testimony could not be introduced before the grand jury. This contention is without merit. While petitioner did testify before a referee in bankruptcy and thereby automatically received the benefit of the immunity grant of 11 U.S.C. 25(a)(10), the immunity granted was limited to use immunity and did not extend to derivative use immunity. Whatever limitations might exist on the use of petitioner's bankruptcy testimony itself in subsequent criminal proceedings, information derived from the testimony was properly admissible before the grand jury. As the court of appeals stated (Pet. App. B, A-25-A-27; 491 F. 2d at 479; footnotes omitted):

> [W]e hold that Dornau received only use immunity in the bankruptcy proceeding and that consequently the Government's alleged derivative use of his testimony was not improper. Section 7(a)(10) of the Bankruptcy Act, as it stood in 1969, conferred only use immunity. It was so worded and had been so interpreted by the Supreme Court. *Arndstein* v. *McCarthy*, 254 U.S. 71, 73 (1920); see 1A Collier on Bankruptcy para. 7.21 at 1013-15. Because use immunity is not coextensive with the privilege against self-incrimination, *Counselman* v. *Hitchcock*, 142 U.S. 547, 564-65 (1892), section

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[2] At the time of petitioner's testimony, that section provided, in pertinent part:

> (a) The bankrupt shall * * * (10) * * * submit to an examination * * *; but no testimony * * * given by him shall be offered in evidence against him in any criminal proceeding * * *.

7(a)(10) could not have been used in 1969 to compel a bankrupt's testimony over an assertion of his fifth amendment privilege. *Arndstein, supra*, 254 U.S. at 73. Consequently,

> * * * the witness faced two alternatives under the [1969] version of the statute: he could choose to testify freely and then later claim whatever protection the statute afforded; or he could refuse to testify on the grounds that the answers sought might be incriminating.

United States v. *Goodwin*, 470 F. 2d 893, 904 (5th Cir. 1972), cert. denied, 411 U.S. 969 (1973). The record in this case indicates that Dornau was informed by the referee of his constitutional right to refuse to testify, and that, without compulsion, he nonetheless chose to testify, relying on the immunity granted by the Act. Such conduct hardly supports Dornau's claim that he received derivative use immunity.

Even if petitioner's assertion that he was compelled to testify were correct, the introduction before the grand jury of information derived from his testimony would not have been grounds for dismissal of his indictment.[3] In *United States* v. *Calandra*, No. 72-734, decided January 8, 1974, this Court held that the fact that evidence is illegally obtained does not preclude its introduction

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[3]As noted above, the court of appeals found that petitioner was not compelled to testify. Although petitioner appeared before the referee in bankruptcy pursuant to order, the referee informed petitioner that he had a right to invoke his privilege against self-incrimination. Petitioner's counsel stated his views as to the scope of the immunity conferred by 11 U.S.C. 25(a)(10) (Pet. App. B, A-26), but his erroneous conclusions were not binding on the government.

before the grand jury. In the course of the opinion, the Court specifically observed that "an indictment valid on its face is not subject to challenge on the ground that the grand jury acted * * * on the basis of information obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination * * *" (slip op. 6). 6).

2. Petitioner also contends that this Court should grant certiorari to resolve a conflict in the circuits as to the extent of immunity provided by the version of 11 U.S.C. 25(a)(10) in effect in 1969. In support of this argument petitioner, citing *United States* v. *Seiffert*, 463 F. 2d 1089 (C.A. 5), asserts that the Second and Fifth Circuits are in conflict. No such conflict in fact exists. The *Seiffert* case held that the 1970 amendment[4] to the Bankruptcy Act, providing derivative use immunity, applies to all cases pending when the amendment became effective. However, as the court below noted (Pet. App. B, A-28), the *Seiffert* decision has been overruled *sub silentio* by the Fifth Circuit in its later decision in *United States* v. *Goodwin*, 470 F. 2d 893, rehearing denied, 470 F. 2d 904, certiorari denied, 411 U.S. 969. Like petitioner, Goodwin testified prior to the effective date of the amendment, and his trial commenced after that date. Although all of the government's case at trial was derived from testimony by Goodwin, who had acquired immunity pursuant to 11 U.S.C. 25(a)(10),

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[4]Act of October 15, 1970, 84 Stat. 929. As amended in 1970, 11 U.S.C. 25(a)(10) provides that no testimony "or any evidence which is directly or indirectly derived from such testimony * * * shall be offered against [the witness] in any criminal proceeding * * *."

the court of appeals affirmed the conviction. Thus, the circuits are in accord.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1974.

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[5]Petitioner further alleges that the court of appeals was without jurisdiction to consider the government's appeal. The court correctly found that pursuant to the 1948 version of the Criminal Appeals Act, 62 Stat. 844, the government could appeal a decision "sustaining * * * a plea in abatement." We rely on the court's holding that the order dismissing the indictment constituted a plea in abatement, thereby vesting it with jurisdiction (Pet. App. B, A-21-A-22; 491 F. 2d at 477).

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